



DEPAUL UNIVERSITY
UNIVERSITY LIBRARIES

DePaul Journal of Art, Technology
& Intellectual Property Law

Volume 22
Issue 1 *Fall 2011*

Article 3

Sweet or Sour: Extending Copyright Protection to Food Art

Caroline M. Reebbs

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

Caroline M. Reebbs, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DePaul J. Art, Tech. & Intell. Prop. L. 41 (2011)

Available at: <https://via.library.depaul.edu/jatip/vol22/iss1/3>

This Lead Article is brought to you for free and open access by the College of Law at Via Sapiientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapiientiae. For more information, please contact digitalservices@depaul.edu.

SWEET OR SOUR: EXTENDING COPYRIGHT PROTECTION TO FOOD ART

Caroline M. Reebs¹

I. INTRODUCTION

Though they are sometimes referred to as “culinary artists,” responsible for preparing food as pleasing to the eye as to the palate, chefs and molecular gastronomists do not possess the same legal rights as other artists, such as painters, sculptors, or composers.² Culinary creations, as one scholar articulates, are in one of intellectual property’s negative spaces.³

This gap in intellectual property protection has a variety of causes. One cause involves conflicting interpretations of the United States Constitution. The U.S. Constitution presents the following goal for federal copyright protection: “promot[ing] the Progress of . . . useful Arts, by securing for limited times to Authors . . . the exclusive Right to their respective Writings and Discoveries.”⁴ While some believe this provision was designed to protect copyright holders to ensure that the holders receive a return on their investments,⁵ others contend that the purpose was instead to “stimulate artistic creativity for the general public good.”⁶ This

1. B.A., University of Toronto, 2007; J.D., University of California, Hastings College of the Law, 2011.

2. J. Auston Broussard, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691, 697 (2008) (quoting STEPHEN MENNELL, *ALL MANNERS OF FOOD* 162 (Univ. of Ill. Press, 2d ed. 1996) (1985) (“Escoffier [lamented] that while artists, writers, musicians and inventors were protected by law, the chef had absolutely no redress for [the plagiarism] of his work.”)).

3. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1768 (2006).

4. U.S. CONST. art. 1, § 8, cl. 8.

5. Lydia Pallas Loren, *The Purpose of Copyright*, 2 OPEN SPACES Q., no. 1, 2000, available at <http://www.open-spaces.com/article-v2n1-loren.php>.

6. Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 J. HIGH

paper maintains that enhanced protection for food art, as opposed to supporting only one of these theories, would instead support both in equal measure.

Regardless of Constitutional interpretation, however, most will agree that eating certain culinary dishes can result in a “transformative aesthetic experience.”⁷ Because of this aesthetic experience, and the other artistic qualities that food shares with conventional art forms, this paper also suggests that culinary creations warrant similar legal protections as the fine arts, particularly when considered in an international doctrinal context.

Other scholarship in this area focuses on the nature of the dispute as it is applied to original menu items.⁸ This paper instead considers food art in two forms, built food and recipes.⁹ Like painting and sculpture, the final creation contains elements of color and form. Like musical compositions, created through the use of protected sheet music, culinary end-products are based on recipes. In this way, both built food and recipes possess fundamental characteristics of “art.”

In addition, this piece also considers intellectual property protections available to food artists within an international framework.¹⁰ Not only do the similarities between food art and fine art support the application of analogous intellectual property rights, but a comparative examination of domestic U.S. law, under

TECH. L. 21 (2009) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

7. Carolyn Levy, *Culinary Production; Mastery of Skills in the Pursuit of Excellence and Art; Ardent Passion; and the Attachment to a History of Progress, Nobility, and Distinction* 21 (June 5, 2007) (M.A. thesis, Simon Fraser University), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&sqi=2&ved=0CDQQFjAC&url=http%3A%2F%2Fsummit.sfu.ca%2Fsystem%2Ffiles%2Fitems1%2F8062%2Fetd2945.pdf&ei=Ir7GTmIEqKC2wWK7LjwDw&usg=AFQjCNGU8iKleYgnh3Tii-V0dc-ttHzumw&sig2=hJPKF8AKNbCj_hjPPz-wQ.

8. See Broussard, *supra* note 2, at 694.

9. “Built food” is a dish designed and actually prepared for consumption whereas “recipe” denotes the method for preparing the built food.

10. For a thorough analysis of the origins of copyright limitations in the United States see Malla Pollack, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1478 (1991).

the Copyright Act, and of international legal theory, under the Berne Convention, also reveal supporting arguments for such added protections.

This paper proceeds in three parts. Part II considers “food art” and provides a working definition of the culinary aesthetic under several cultural, academic and legal doctrines. Part III examines the international legal instruments governing moral rights, the benefits which remain in the artist, and their prospective application to food art. Finally, Part IV discusses possible legal solutions to filling the regulatory gap regarding food art in U.S. intellectual property law by applying the components of international and statutory theory discussed in the proceeding sections.

Aside from the U.S. government, the restaurant industry is the largest employer in the United States, employing about 12 million individuals.¹¹ According to one study, the total economic value of the dining industry is \$1.2 trillion, which includes sales in related industries.¹² Eating and gustatory appreciation are central components of American culture. Providing protection to the chefs who design the culinary creations consumed by so many may contribute to and enhance the success of this industry.¹³

11. NEW YORK STATE RESTAURANT ASSOCIATION, *Tips for Opening & Running a Restaurant in New York City, legacy*. <http://www.nypl.org/research/sibl/smallbiz/qt6/OpeningRestrInNYC.ppt>, at 2.

12. *Id.* The sales in related industries are in agriculture, transportation, and manufacturing. *Id.*

13. *But see* Cunningham, *supra* note 6 (arguing that expending copyright would “hinder competition and . . . discourage creativity and innovation”); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2006) (arguing that copyright should not extend to culinary creations based on the “economic impact . . . and the force of involuntary norms about copying, plagiarism, and attribution”).

II. DEFINING FOOD ART

“[L]iteral taste is unconscious, subjective, and too intimate to allow for any discursive elaboration.”¹⁴

A. Food Art: The Intellectual Property Gap

The Constitution expresses an intent to protect “useful *Arts*.”¹⁵ There are, however, many different definitions of art—which vary depending on cultural, economic, or legal contexts. Before considering the current intellectual property protections, or lack thereof, it is therefore helpful to consider the aesthetic and functional characteristics of food art from several perspectives. The following sections compare food art to other art forms, such as literature, music, and sculpture, which receive superior legal protections. If food art possesses sufficiently similar underlying traits, then by analogy identical legal protections may be warranted.

The U.S. Supreme Court case of *Baker v. Selden* was detrimental to the idea that recipes are copyrightable.¹⁶ In *Baker*, the Court held that if, on being copyrighted, a monopoly ensues, not only of the piece itself, but also of the process upon which it is based, then copyright should not be enforced.¹⁷ This holding could have been narrowly applied, but scholars and some courts have interpreted *Baker* to mean instead that “because recipes are traditionally reproduced to be used for cooking rather than for their literary or artistic value, they are not considered susceptible to copyright protection.”¹⁸ But this argument, that a dish’s artistic merit is secondary to the artistic value, is not supported by the current canons of cultural and artistic interpretation.

14. Krishnendu Ray, *Domesticating Cuisine: Food and Aesthetics on American Television*, GASTRONOMICA: J. OF FOOD & CULTURE, Winter 2007, at 50, 57.

15. U.S. CONST. art. 1, § 8, cl. 8 (emphasis added).

16. *Baker v. Selden*, 101 U.S. 99 (1880).

17. *Id.* at 102-07.

18. Broussard, *supra* note 2, at 707.

Chefs and cooks alike consider their culinary productions to be art. But the culinary elite emphasize an important distinction between “cooking” and “cuisine.” Whereas “cooking” is described as a transformative process with the primary goal of producing food for consumption, “cuisine” is a “gastronomical process that transforms the diner.”¹⁹ Furthermore, *haute cuisine* is further distinguished as a set of elaborate preparations and presentations, but primarily as “artful.”²⁰ For the purposes of this paper, “food art” includes built food, haute cuisine, food sculpture, and in some instances, recipes.

Not only do chefs and those in the culinary business believe that food is art, but general consumers also appear to view some food preparations as meriting this label. “Food Art” exhibits, for example, are flourishing. Recent exhibitions, found worldwide, include “America Eats” at the Museum of American Folk Art in New York City, New York, “Eat Your Art Out” in Berkeley, California, and “Food Art” in Cambridge, England, to name a few.²¹

Though chefs and the public may interpret food as art, the next sections examine whether current academic and legal doctrines also support this determination.

1. Applying Academic Definitions of Art to Food

“A work of art is realized when form and content are indistinguishable . . . when they fuse. When form predominates, meaning is blunted. . . . When content predominates, interest lags.”²²

19. Levy, *supra* note 7, at 34.

20. *Haute Cuisine Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/haute%20cuisine> (last visited Nov. 18 2011).

21. Pollack, *supra* note 10, at 1478.

22. Paul Rand, INSPIREUX (Oct. 12, 2009), <http://www.inspireux.com/2009/10/12/a-work-of-art-is-realized-when-form-and-content-are-indistinguishable/>.

Professor Belton describes the three elements characteristic of fine art: form, content, and context.²³ Based on these elements—frequently cited by appraisers, professors, and art critics—food sculpture, haute cuisine, and even recipes, may be considered “art.” To assess art, particularly visual art, these three characteristics and their interrelationship, are examined.

Some argue that recipes and culinary creations are substantially derivative and therefore, due to this lack of originality, do not warrant the full arsenal of intellectual property protection.²⁴ Chefs work through an “open source” model by drawing inspiration from many different sources and by developing others’ recipes.²⁵ There is, according to some scholars, a norm of sharing in the industry.²⁶ But all art forms rely on this norm of sharing. Regardless of the degree of sharing, food art possesses the three characteristics of fine art described by Belton. Each element will now be examined to assess whether a food creation, as a whole, may be sufficiently original and therefore capable of generating the enhanced aesthetic experience worthy of an art appellation.

Form, in an art context, is defined as “constituent elements of a work of art independent of their meaning.”²⁷ For example, form may concern the color of a piece and its size, as opposed to its emotional significance.²⁸ There is less agreement, however, concerning a definition for content.²⁹ Some maintain that content is the subject matter of the work, whereas others claim it is the piece’s meaning that is significant.³⁰ Finally, context may be defined as an aggregation of “the circumstances in which a work of art is, or was, produced or interpreted.”³¹

23. Robert J. Belton, *Art History: A Preliminary Handbook*, UNIVERSITY OF BRITISH COLUMBIA (May 27, 2008), http://web.ubc.ca/okanagan/creative/links/arthistory/The_Elements_of_Art.html.

24. Cunningham, *supra* note 6.

25. *Id.*

26. *Id.*

27. Belton, *supra* note 23.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

Form is easily discussed and evaluated as color, size, and shape are generally easy to identify. In specific pieces, such as pastries, there is significant elaboration and detail, which often parallel or exceed standard forms of art and sculpture. Not only is texture and harmony observed, but built food in particular, appeals to other senses as a result of perceptible aromas and tastes.³² The element of form, however, diminishes as the food sculpture is rendered in the preliminary recipe. By reading through and conceiving of the eventual built food, form though may be imagined and considered.

Content is also palpable with food art, particularly built food. Many maintain that, like other forms of art, the knowledge and background of the perceiver, or taster with respect to food art, is important. Scholar Ferguson writes, for example, that “for the gastronome, knowledge of eating depends less on the moment of pleasure in consumption and much more on the conception of what taste should mean.”³³ She continues, “[c]uisine, like dining, turns the private into the public, the singular into the collective, the material into the cultural.”³⁴ Not only therefore, is built food a visual and aesthetic experience, but it is also “bodily art in that we must ingest it to experience the full effects of the creative product.”³⁵ The content element of art is thus established by identifying the emotions or sensations observed when eating the work. The aesthetic importance of food is depicted as a “fecund symbolic system where it can denote, represent, and exemplify a whole range of expressions, just like any other art form.”³⁶

2. Applying Legal Definitions of Copyrightable Art to Food

Because art can enter the U.S. duty-free, and so must be specifically-defined, customs cases provide workable definitions of art for our purposes. To fall under the customs definition of art,

32. Pollack, *supra* note 10, at 1489.

33. Levy, *supra* note 7, at 33 (citing PRISCILLA PARKHURST FERGUSON, *ACCOUNTING FOR TASTE: THE TRIUMPH OF FRENCH CUISINE* 178 (Univ. of Chicago Press 2006)).

34. *Id.* at 34 (quoting FERGUSON, *supra* note 33, at 3).

35. Levy, *supra* note 7, at 68.

36. Ray, *supra* note 14, at 57.

the piece must be scrutinized under two steps. First, it must be subsumed under one of the following categories: original paintings and drawings, collages and decorative plaques, original prints, engravings and lithographs, sculptures and statuary, postage stamps, collectors' pieces and antiques.³⁷ It is immediately apparent that recipes would not fit easily into any of these categories. Food sculpture, however, would fall within this first prong as "sculptures," which are listed as one of the accepted categories of "art."

After being associated with a category, the second part of the customs test is an assessment of whether the piece is the product of an artist, as opposed to an artisan.³⁸ To determine whether the creator is an artist, customs officials consider academic credentials and whether the applicant is recognized by peers or art critics as an artist.³⁹ The creator is an artist only "when the creator leaves the paths of his or her trade and, as a result of a mental concept, constructs something original that appeals to the artistic eye and mind."⁴⁰ As will be seen below, chefs, and, increasingly, molecular gastronomists, meet this criteria.

Chefs, as artists, are those dedicated to "culinary production; mastery of skills in the pursuit of excellence and art; ardent passion; and the attachment to a history of progress, nobility, and distinction."⁴¹ The criterion that the artist be "recognized by peers," is certainly the case. Moreover, recently, chefs have mobilized, much as other professions, and now have dedicated associations, schools, conferences, exhibitions, and journals devoted to the mastery of their art.⁴² Therefore, academic credentials, much as a painter can obtain a Bachelor of Fine Arts (BFA), are similarly possible with a diploma or other formats for

37. LEONARD D. DUBOFF & CHRISTY O. KING, *ART LAW IN A NUTSHELL* 4 (Thomson West, 4th ed. 2006).

38. *Id.* at 5.

39. Customs Service Ruling, C.S.D. 81-54, 15 Cust. B. & Dec. 846, 847-48 (1980).

40. DUBOFF & KING, *supra* note 37, at 5.

41. Levy, note 7, at 56; *see generally* AMY B. TRUBEK, *HAUTE CUISINE: HOW THE FRENCH INVENTED THE CULINARY PROFESSION* (Univ. of Pa. Press 2000).

42. *Id.* at 55.

chefs.⁴³ Current trends demonstrate that the preparation of food art requires the same level of expertise and qualification as other art forms.⁴⁴

In addition, just as other art media are becoming increasingly sophisticated, a new form of food artistry—called molecular gastronomy—is developing. Though not all chefs have embraced this term, with some in fact repudiating it,⁴⁵ this sub-specialization is flourishing.⁴⁶ Molecular gastronomy requires an understanding of the chemistry and physics of food preparation.⁴⁷ It can include complex forms of flavor distillation, “food foams,” and unusual cooking techniques.⁴⁸ While this paper suggests that molecular gastronomy warrants enhanced legal protection such as copyright, others go farther to say that the “more culinary dishes resemble science projects, the more reasonable patents become.”⁴⁹

There is an exclusion, however, to the customs definition of art. Despite the previous requirements, if the item is one of utility or produced for commercial uses, it is excluded from the art definition.⁵⁰ Most courts hold that if the work under consideration has any functional characteristics, it is precluded from being classified as a work of art.⁵¹ To determine whether the item is to be used for a commercial purpose, courts consider the reason *why*

43. For an outline of four different types of programs, see *Cooking School Degrees: What to Look for in a Program*, CULINARYSCHOOLS.ORG, <http://www.culinaryschools.org/culinary-degree-types/> (last visited Nov. 18, 2011).

44. See, e.g., Christine Muhlke, *A Feast for the Eyes*, N.Y. TIMES (Dec. 16, 2007), <http://www.nytimes.com/2007/12/16/magazine/16food-t.html?scp=11&sq=food+as+art&st=nyt>.

45. Ferran Adria, Heston Blumenthal, Thomas Keller & Harold McGee, *Statement on the 'New Cookery'*, GUARDIAN OBSERVER (Dec. 6, 2009), <http://observer.guardian.co.uk/foodmonthly/story/0,,1968666,00.html>.

46. Hervé This, *Food for tomorrow? How the Scientific Discipline of Molecular Gastronomy Could Change the Way We Eat*, EUR. MOLECULAR BIOLOGY ORG., November 2006, available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1679779>.

47. *Id.*

48. Raustiala & Sprigman, *supra* note 3, at 1765 n.156.

49. *Id.*

50. DUBOFF & KING, *supra* note 37, at 5.

51. *Id.* at 6.

the items are imported rather than the *artist's intent* in creating them.⁵²

Thus, it appears that haute cuisine, food sculpture, and, to a lesser degree, recipes, do not fall easily within the accepted legal definitions of “art.” However, these forms do possess the academic traits of art. This aesthetic discrimination may result from what one scholar dubs, “sensory snobbery.”⁵³ Author Carolyn Levy investigates the cause of the disparate treatment for food items and concludes that many believe that sight and hearing are “higher” senses, as compared to taste and smell, because they are “more physically distant from the perceiver.”⁵⁴ In her view, this distance means that, “the perceiver is comparatively free from the pull of physical appetites,” which thereby results in a freer mind and ability to appreciate the aesthetic.⁵⁵

Though the customs legal definition fails to embrace food as a recognized art form, the following section purports to outline alternative methods of obtaining equal treatment for food art.

B. U.S. Copyright Law and Unprotected Food Art

1. Statutory Interpretation

“The history of copyright law has been one of gradual expansion in the types of works accorded protection.”⁵⁶

Though *Baker* may appear to be an obstacle,⁵⁷ a textual interpretation of the Copyright Act suggests a compelling basis on which to extend copyright to built foods and recipes. The legislative notes to section 102 of the Copyright Act acknowledge that because authors are “continually finding new ways of expressing themselves . . . [that the Act] does not intend either to

52. *Id.* at 7 (emphasis added).

53. Levy, *supra* note 7 at 22.

54. *Id.*

55. *Id.*

56. H.R. REP. NO. 94-1476 (1976).

57. *See supra* Part I.A.

freeze the scope of copyrightable subject matter.”⁵⁸ While recipes and food art are not a completely new form of expression, as mentioned in Part A of this paper, the growing recognition of culinary art and the scientific development of this industry,⁵⁹ suggests an aesthetic area worth additional consideration, particularly in light of societal and technological change.

In the United States, copyright requirements are in found in section 102 of the Copyright Act, which provides protection for “original works of authorship fixed in a tangible medium of expression.”⁶⁰ The phrase, “fixed in a tangible medium of expression” is further described in section 101, and defined as a work that is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period more than transitory duration.”⁶¹ It would appear at first glance that recipes are covered by this provision, as they are capable of being both perceived and reproduced. Copyright protection, however, is explicitly limited to “literary, musical, dramatic, choreographic, pictorial, graphic, architectural and sculptural works” as well as “pantomimes, sound recordings, and motion pictures.”⁶² Absent from this list of covered art forms are fragrance formulae, clothing designs, and recipes.

Section 106 of the Copyright Act identifies the general nature of the rights that fall under the scope of copyright. Protection under section 106 consists of the right to prohibit reproduction, performance, distribution, or display of the piece.⁶³ Copyright

58. H.R. REP. NO. 94-1976.

59. See This, *supra* note 46.

60. 17 U.S.C. §102(a) (2006).

61. 17 U.S.C. § 101.

62. 17 U.S.C. § 102 (a)(1)-(8).

63. 17 U.S.C. § 106. There are five exclusive rights that a U.S. copyright owner receives, including the rights: 1) to reproduce copyrighted work by any means; 2) prepare derivative works based on copyrighted work; 3) distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending; 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works, to perform the work publicly; and 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. *Id.*

rights in the U.S. can also be cumulative and sometimes overlap.⁶⁴ Owners can assign, transfer, license, or convey any one or more of their section 106 rights, while simultaneously retaining any remaining rights.⁶⁵

Section 201 provides assignees of section 106 rights with their own right to protect these acquired privileges. Unless there is a written agreement that explicitly transfers such rights to the purchaser, however, the creator of the piece “retains all rights in the work sold.”⁶⁶ As DuBoff explains, “[o]wnership of the tangible embodiment of the work in the art form is now recognized under federal law as separate and distinct from ownership of the intangible rights in the work.”⁶⁷

Copyright protection does not extend to ideas, procedures, or processes: “mere listings of ingredients, as in recipes, formulas, compounds or prescriptions are not subject to copyright protection.”⁶⁸ The only exception to this exclusion is for a product that is “accompanied by substantial literal expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook.”⁶⁹ Recipes may, therefore, be protected when they are grouped together. Copyright shields the “original expression” in a recipe, but does not extend to the procedures and methods that the recipe describes. In other words, current copyright fails to protect “the attributes that are the core of a recipe.”⁷⁰

Some believe that the rationale for this exclusion is that “an individual recipe is a process of creating something, rather than a creative literary expression.”⁷¹ But instead of being *either* a process or a “creative literary expression” many built foods are

64. DUBOFF & KING, *supra* note 37, at 169.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Recipes*, U.S. COPYRIGHT OFFICE (July 7, 2011), <http://www.copyright.gov/fls/fl122.html>.

69. *Id.*

70. Raustiala & Sprigman, *supra* note 3, at 1766.

71. *Copyrighting Recipes*, FINDLAW, <http://smallbusiness.findlaw.com/copyright/copyright-realworld/recipe-copyrighting.html> (last visited Nov. 18, 2011).

both. If built food is a creative literary expression, as the law requires, then it would appear to have the attributes necessary to be covered under the Copyright Act, even though built food is *also*, in the case of a recipe, a delineated process.

There are few cases assessing whether recipes or built food, warrant a copyright. In *Publications International, Ltd. v. Meredith Corp.*, the court considered whether “Curried Turkey and Peanut Salad” met the criteria for copyright.⁷² The court identified a key component of copyright in stating that “[t]he sine qua non of copyright is originality.”⁷³ To be original, the court went on, the piece has to “possess some minimum indicia of creativity” in that the piece be a product of the “original intellectual conceptions of the author.”⁷⁴ Because no one individual can legitimately claim to be an originator of facts, the court reasoned, facts are excluded from copyright protection.⁷⁵ But ingredient lists are not merely itemizations of facts. Often food developers do extensive research and experimentation before including an ingredient in a recipe. The “stamp of the author’s originality” is often found in what is omitted from the ingredient list, in comparison to similar recipes, or by what is included, which others have not.⁷⁶

The second aspect of a recipe, the directions for combining the constituent ingredients, also possesses traits of the author’s originality. The court in *Meredith* stated that the combination of ingredients, based on dictionary terms for “cooking” was a “process or procedure” and under the Copyright Office’s prohibition, unequivocally not copyrightable because it was therefore under the purview of patent law.⁷⁷ However, the court did not distinguish a recipe from a comparable art form such as sheet music. A composer also develops a form of “recipe” by depicting various notes on paper. These notes are eventually

72. *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 479 (7th Cir. 1996).

73. *Id.* (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

74. *Id.* (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

75. *Id.* (citing *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985)).

76. *Feist*, 499 U.S. at 350 (citing *Harper & Row*, 471 U.S. at 547-48).

77. *Meredith*, 88 F.3d at 481.

combined, much as ingredients in a cake are combined. Moreover, some chefs, like dancers who pride themselves on the manner of their execution of difficult choreography, pride themselves on the execution of the recipe's directions. Author J. Austin Broussard analogizes recipes to the schematics necessary for dance steps or to sheet music necessary for musical composition, both of which are merely the underlying copies of the resultant, original work.⁷⁸ It appears that, though a recipe depicts what may fall under patent law, a recipe *also* exhibits the characteristics that would make it copyrightable.

The *Meredith* decision did not “express any opinion whether recipes are or are not *per se* amenable to copyright protection” and emphasized that “the doctrine is not suited to broadly generalized prescriptive rules.”⁷⁹ However, absent musings, descriptions concerning historical origin, or other expressions, the court found that recipes are not likely to be copyrightable.⁸⁰

More clearly than recipes, however, constructed food, or built food art, is consistent with current copyright provisions, though it remains unprotected. Much as the musical score analogy referenced above, recipes and the final product, the built food, are inextricably linked.⁸¹ As many have pointed out,⁸² it is possible that the courts have misinterpreted, or more simply, gotten their analysis backwards. Instead of focusing on the final product, the dish or culinary creation itself, the court is focusing on the process or method of construction.

2. Additional IP Protections—Trademarks, Patents, and Trade Secrets

The other forms of intellectual property protection available to non-food artists are both weaker with respect to copyright law, and less analogous. They warrant a brief examination, nonetheless, because each possesses elements that may be pieced together to

78. Broussard, *supra* note 2, at 715.

79. *Meredith*, 88 F.3d at 480.

80. *Id.* at 481.

81. Buccafusco, *supra* note 13, at 1133-34.

82. Broussard, *supra* note 2.

create an appropriate solution to the current culinary art impasse, discussed in Section III.

Trademarks are “any word, name, symbol, device, or combination thereof, which a producer uses to distinguish its goods from those of other manufacturers or sellers and to indicate the source of those goods.”⁸³ Courts have held that consumers generally do not perceive flavors as trademarks.⁸⁴ Flavors are instead an “inherent feature of a product that renders [the product] more appealing.”⁸⁵ For a flavor to be trademarked, therefore, it would likely need to acquire a secondary meaning in the minds of consumers before it would be eligible for legal protection.⁸⁶

With respect to food art, an applicable trademark may be the name of the specific dish created or the name of the manufacturer. Though chefs may look to trademark protection, it is not as useful because while the name of a dish may be safe from infringement or copying, the dish itself would not be protected. Therefore, trademark protection is not an adequate means to safeguard the inventions of food artists.

Patent protection shares some characteristics with copyright safeguards. There are generally three different forms of patent protection available to inventors: utility, design, and plant.⁸⁷ Once a maker determines the form of the patent, three primary elements must be met for patentability, including utility, novelty, and non-obviousness.⁸⁸

83. 74 AM. JUR. 2D, *Trademarks and Tradenames* § 1 (2011).

84. *In re N.V. Organon*, 79 U.S.P.Q.2d (BNA) 1639, 1649 (T.T.A.B. 2006); see also Amanda E. Compton, *Acquiring a Flavor for Trademarks: There's No Common Taste in the World*, 8 NW. J. TECH. & INTELL. PROP. 340, 350 (2010).

85. *Organon*, 79 U.S.P.Q.2d at 1649.

86. *Id.*

87. U.S. PAT. & TRADEMARK OFF., GENERAL INFORMATION CONCERNING PATENTS 1-2 (2010), http://www.uspto.gov/patents/resources/general_info_concerning_patents.pdf.

88. *What Are the Elements of Patentability?*, MEDICAL COLLEGE OF WISCONSIN, <http://www.mcw.edu/OTD/router.asp?docid=10538> (last visited Nov. 18, 2011).

The U.S. Patent Office maintains that recipes generally lack invention⁸⁹ and that one is also unlikely to establish that a recipe is new and non-obvious.⁹⁰ As opposed to copyright canons, there is no affirmative exclusion of recipes.⁹¹ Also, some industrial food companies have successfully managed to use patents to protect their food products.⁹² But there are significant drawbacks to a successful patenting. The main issue is that culinary creations are susceptible to slight modifications, which use the original inventor's methodology but substitute certain non-essential ingredients to circumvent the patent.⁹³ In addition, patent protection is only applicable if the inventor meets the often-difficult criterion under patent law of novelty. Even molecular gastronomists have a difficulty meeting the criteria of "inventive step" under the law.⁹⁴ A hurdle in this regard is that the creator must prove that there is no other recipe that predates or anticipates the creator's submission.⁹⁵ Non-obviousness is another criterion that must be established. Because of the increased training and education of contemporary chefs,⁹⁶ it is also difficult to demonstrate that the recipe method is not known or easily discernible by other chefs. Some believe that the only way for a chef to patent a creation is to invent a new culinary *method* as opposed to a listing of ingredients and instructions.⁹⁷

Another hurdle unique to patents and particularly challenging for chefs to overcome is the high cost of obtaining one.⁹⁸ In addition to royalty fees, chefs risk being exposed to patent

89. 2 JOHN GLADSTONE MILLS III, DONALD C. REILEY III & ROBERT C. HIGHLEY, *PATENT LAW FUNDAMENTALS* § 7:11 (West, 2d ed. 2008).

90. MILLS ET AL., *supra* note 89.

91. Cunningham, *supra* note 6.

92. *Id.*; see also Jason Krause, *When Can Chefs Sue Other Chefs? Defining Legitimate Legal Claims in the Restaurant World*, CHOW.COM (Sept. 4, 2007), <http://www.chow.com/food-news/54101/when-can-chefs-sue-other-chefs/>.

93. Cunningham, *supra* note 6.

94. *Id.*; see also Krause, *supra* note 92.

95. Cunningham, *supra* note 6.

96. See *supra* Part I.

97. Richard Tanzer, *Re: Patent for a Recipe*, INTELLECTUAL PROPERTY LAW SERVER (July 1, 2004, 8:12 PM), <http://www.intelproplaw.com/Forum/Forum.cgi?board=whatispatentable;action=display;num=1092519968>.

98. Cunningham, *supra* note 6.

infringement suits and enforcement costs.⁹⁹ Patent holders also have a duty to regularly “police” their field of invention to ensure that their patent remains un infringed.¹⁰⁰

Finally, trade secret law is the primary intellectual property protection utilized by chefs, but it is also the weakest of the four intellectual property canons. A trade secret consists of “information, including a formula, pattern, compilation, program device, method, technique, or process” that meet two criteria.¹⁰¹ First, the piece must derive “independent economic value . . . from not being generally known to, and not being readily ascertainable . . . by other persons who can obtain economic value from its disclosure or use.”¹⁰² Second, the item must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”¹⁰³

Recipes, therefore, must be of limited availability, possess independent economic value, and be kept in relative secrecy.¹⁰⁴ These criteria are undoubtedly met by many, but enforcement is the difficult part of trade secret protection. To invoke protection, a producer may not share the dish with the public, as this would mean they did not make an effort to keep the dish a secret. The only reasonable way that recipe protection can be enforced is through the use of a nondisclosure agreement.¹⁰⁵ But a nondisclosure agreement only applies to the contracting parties and will not prevent reverse engineering or tasting by competitors in order to emulate or determine the ingredients and method used in the dish.¹⁰⁶

99. *Id.*

100. *Id.*

101. UNIFORM TRADE SECRETS ACT § 1(4), (1986), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utsa85.htm>.

102. *Id.*

103. *Id.*

104. *Id.*

105. Martha Neil, *MIXING IP WITH MMMMMM*, The National Pulse, 19 ABA J. E-Report 3 (May 11, 2007).

106. Katherine M. Todd, John M. Hession, *Venture Capital 1991: Forming the Fund and Financing Issues*, 583 PLI/Comm 259, 297 (1991) (stating that reverse engineering is permissible for the purpose of discovering a trade secret).

This section outlined several interpretations of the current copyright framework, which would support the inclusion of food art under the framework's umbrella of protections. The following section, Part II, reviews international doctrines to assess whether, if applied to U.S. domestic law, they would provide more coverage. Part II also discusses the potential benefits of the application of international law, not only to food artists, but also to other, presently non-copyrightable art forms.

III. EXTENDING INTELLECTUAL PROPERTY PROTECTION TO FOOD ART

A. Tackling Moral Rights

This section discusses the applicability of moral rights under the Berne Convention for the Protection of Literary and Artistic Works ("Convention") and those under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Moral rights do not refer to privileges in the religiously moral sense; rather, they involve a personal and reputational link between an artist and their creation.¹⁰⁷ The attendant rights can include ownership, alteration, and attribution rights, but vary depending on "cultural conceptions of authorship and ownership."¹⁰⁸ Whereas the domestic intellectual property regime examined in Part I may support the argument that food art merits enhanced legal protection, international copyright agreements, based on moral rights theory, may provide even stronger support for this conclusion.

The Berne Convention is the primary international treaty that addresses moral rights.¹⁰⁹ Though the Convention may offer the broadest support for moral rights, the TRIPS overtook the

107. Betsy Rosenblatt, *Moral Rights Basics*, Harvard Law School (Mar. 1998), <http://cyber.law.harvard.edu/property/library/moralprimer.html>.

108. *Id.*

109. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L. J. 353, 356 (2006). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the North American Free Trade Agreement (NAFTA), explicitly exclude moral rights.

Convention in recent legal application, and is, unfortunately for food artists, significantly weaker in this regard.

1. The Berne Convention

The purpose of the Convention is to “constitute a Union for the protection of the rights of authors in their literary and artistic works,” with no particular mention of trade or industry.¹¹⁰ The Convention imposes minimum standards of protection on “*every production in the literary, scientific, and artistic domain, whatever may be the mode of its expression.*”¹¹¹ Signatory members are encouraged to exceed these minimum standards by providing enhanced protections.¹¹²

On its face therefore, the Convention appears more inclusive than current U.S. copyright statutes. The phrase “every production” would certainly embrace built food and other culinary creations, and the phrase “whatever may be the mode of its expression” further supports this interpretation. Though there is no case law or interpretive work on the topic, it appears that the Convention provides the broadest scope of coverage known to artists, regardless of the media employed. Under its express terms, food artists, chefs, and molecular gastronomists would have proper protection—that is, if the Convention were implemented, as drafted, in the United States.

110. Berne Convention for the Protection of Literary and Artistic Works, art 1bis, amended Sept. 28 1979 [hereinafter Berne Convention], *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P82_10336; *see also* Mira T. Sundara Rajan, *Moral Rights and Copyright Harmonisation: Prospects for an “International Moral Right”?* 17TH BILETA ANNUAL CONFERENCE (Apr. 5, 2002), *available at* <http://www.bileta.ac.uk/Document%20Library/1/Moral%20Rights%20and%20Copyright%20Harmonisation%20-%20Prospects%20for%20an%20International%20Moral%20Right'.pdf>.

111. Berne Convention, *supra* note 110, at art. 2(1) (emphasis added); *see also* Susan Tiefenbrun, *A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention*, 17 WIS. INT’L L.J. 1, 14 (1999) (citing 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2-27 (Melville B. Nimmer & Paul E. Geller eds., 1988)).

112. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 16 (1988).

Though the United States enacted the Berne Convention Implementation Act of 1988 (“BCIA”),¹¹³ it relies on pre-existing statutes such as the Lanham Act to protect moral rights, which is unlike other member countries that developed specific moral rights statutes.¹¹⁴ Reliance on the Convention in a U.S. suit is prohibited.¹¹⁵ Litigants must cite U.S. statutes or common law to support a cause of action. The broad scope of the Convention therefore, and its potential inclusion of food art, is thereby thwarted in the United States. Pursuant to the BCIA, “[t]he obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.”¹¹⁶ To bring forth a claim, therefore, a cause of action must be found under state or federal law.¹¹⁷

The United States’ failure to enact specific moral rights legislation is often lamented by the European Commission,¹¹⁸ which described the situation as an “imbalance of benefits from Berne Convention membership to the detriment of the European

113. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.); *see also* Howard B. Abrams, *The Law of Copyright* § 19:16.

114. Rigamonti, *supra* note 109, at 358; Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 117 (2005); *See, e.g.*, William Strauss, *The Moral Right of the Author*, 4 AM.J.COMP.L. 506, 514 (1955) (for a discussion of a specific French moral rights statute).

115. 17 U.S.C. § 104(c), stating
[n]o right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

116. Berne Convention Implementation Act § 2(2).

117. *Id.*

118. Even after the enactment of the Visual Artists Rights Act, 17 U.S.C. 106A.

side.”¹¹⁹ But others contend that there are a numerous variations among member nations in the form and degree of adherence, arguing that “moderate divergences” are tolerated.¹²⁰

Though there is an inequitable application of the Convention among E.U. member nations, the United States may benefit from an approach followed by nations that uphold the Convention more stringently. However, it is unlikely that the Convention will be applied to U.S. law in an expansive manner. Food artists will need to pursue other avenues to achieve the desirable moral rights the Convention articulates.¹²¹ This is because the Berne Union lacks a formal procedure for “determining whether the laws of a nation filing an instrument of accession conform to the requirements of the Berne Convention.”¹²² Enforcement of the Convention is generally left to the courts of the country where the rights are asserted,¹²³ rather than to a neutral body. This renders enforcement challenging because the determination of whether a member country is in compliance with the BCIA is left to the member country itself. Additionally, if another member nation complains that the United States failed to comply with the Convention, the international dispute would have to be litigated before the International Court of Justice.¹²⁴ And even that proceeding would depend on whether the United States agreed to the international court’s jurisdiction.¹²⁵

The ineffectiveness of the Berne Convention is a loss to food artists due to its expansive enumeration of rights. A central feature of the Convention is the emulation of the French and German

119. Rigamonti, *supra* note 109, at 358 n.29 (quoting EUROPEAN COMMISSION, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 8, 65–66 (Dec. 2004)).

120. Abrams, *supra* note 113.

121. *See supra* Part III.

122. Abrams, *supra* note 113; *see also* Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J.L. & Arts 513, 518 (1986) (statement of Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization).

123. Abrams, *supra* note 113.

124. Abrams, *supra* note 113; *see also* Berne Convention, *supra* note 110, at art. 33.

125. *Id.*

droits moraux.¹²⁶ Under the Convention, moral rights are applied to *all creative acts*.¹²⁷ These “moral rights” include the key rights of paternity and identity, which are designed to protect creators from the distortion or mutilation of their pieces, even after the works have been sold or the authors have licensed their economic rights.¹²⁸ Article 6bis protects the moral rights of attribution and integrity

[i]ndependent of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author’s honor or reputation.¹²⁹

The economic and cultural benefits of extending these rights to food artists would be significant.¹³⁰ By claiming authorship of works derived pursuant to a given chef’s recipe, food artists would be able to prevent the unbridled copying of their creations. The goal of the U.S. Constitution, to promote the progress of art,¹³¹ and the Constitution’s suggested method, “securing for limited times to Authors . . . the exclusive Right to their respective Writings and Discoveries,”¹³² would thus be upheld.

Though several of the Berne Convention’s specific moral rights provisions have not been implemented statutorily in the United States, Author Susan Tiefenbrun believes that the United States is nonetheless increasing its compliance with the Convention.¹³³

126. Rigamonti, *supra* note 109, at 356 n.15.

127. Berne Convention, *supra* note 110, at art. 2(1)

128. Tiefenbrun, *supra* note 111, at 14; *see also* Joseph Greenwald & Charles Levy, *Introduction to Berne Convention of September 9, 1866 for the Protection of Literary and Artistic Works*, 1 BASIC DOC. INT’L ECON. LAW 711, 711-12 (1990).

129. Berne Convention, *supra* note 110, at art. 6bis.

130. *See* discussion *infra*.

131. U.S. Const. art. 1, § 8, cl. 8.

132. *Id.*

133. Tiefenbrun, *supra* note 111, at 19.

There are recent indications that the United States is increasing moral rights protections for artists; for example, the United States enacted a law protecting works of architecture,¹³⁴ enacted a digital home recording levy,¹³⁵ and instituted higher levels of moral rights protection for visual artists.¹³⁶ Though none of these developments apply to food art, if the United States continues to expand moral rights coverage, it is also possible that chefs' creations will be one day be protected.

2. *Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")*

The TRIPS agreement was adopted by the United States and other member countries in 1995.¹³⁷ Many of its provisions on copyright were duplicated from the Berne Convention.¹³⁸ In contrast to the Convention, however, "approaches to international copyright in the present century could not be more striking."¹³⁹ Moral rights are excluded from TRIPS coverage.¹⁴⁰ This means that, as is generally the case in the United States, if economic rights are lawfully acquired, moral rights, such as distortion or mutilation, cannot be questioned.¹⁴¹ Though the TRIPS agreement is the most recent and expansive international intellectual property treaty, it provides far less support to food artists than the Berne Convention.

The principal objective of TRIPS is "to promote effective and adequate protection of intellectual property rights" in order to

134. *Id.*

135. *Id.*

136. Visual Artists Rights Act, 17 U.S.C. § 106 (2010).

137. *Overview: the TRIPS Agreement*, World Trade Organization, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Nov. 19, 2011).

138. *Id.* Many of its trademark and patent provisions were taken from the Paris Convention for the Protection of Industrial Property. *Id.*

139. Sundara Rajan, *supra* note 110, at 2.

140. Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*, 12 PACE INT'L L. REV. 425, 442 (2000).

141. *Id.*

“reduce distortions and impediments to international trade.”¹⁴² It provides the minimum standards of intellectual property regulation that members must implement,¹⁴³ though members are free to determine their own methods of implementation.¹⁴⁴

Author Mira T. Sundara Rajan writes that this new framework for international copyright fundamentally altered the theory and practice of copyright law.¹⁴⁵ She argues that because copyright always represented a “delicate balance between a territorially-based right derived from statutes and international rules governing the cross-border movement of works,”¹⁴⁶ the TRIPS, as it represents a harmonization of copyright law, tied closely to trade purposes, now “[tips] this balance strongly to one side.”¹⁴⁷ Though there is presently no consensus regarding the long-term effects of this shift on “the arts, creativity, or cultural heritage,”¹⁴⁸ there is no doubt that food art is further hampered in obtaining increased intellectual property protection. Aside from recipes and industrial food, due to the inherent impermanence of most culinary creations, the TRIPS agreement appears to emphasize the transferability between nations of goods and commodities, as opposed to art.

On the other hand, unlike other agreements on intellectual property, TRIPS has a powerful enforcement mechanism.¹⁴⁹ States can be disciplined through the World Trade Organization’s dispute settlement mechanism.¹⁵⁰ It remains “the most comprehensive multilateral agreement on intellectual property” to date.¹⁵¹ The TRIPS agreement has been in effect for over fifteen years, but

142. Sundara Rajan, *supra* note 110, at 2 (quoting Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 320 (1994) [hereinafter TRIPS], *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

143. *Overview: the TRIPS Agreement*, *supra* note 137.

144. *Id.*

145. Sundara Rajan, *supra* note 110, at 2.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Overview: the TRIPS Agreement*, *supra* note 137.

150. *Id.*

151. *Id.*

there has not been significant progress in providing enhanced protections to food art.

B. U.S. Law Revisited

In the absence of a contract stating otherwise, authors in the United States retain no protection for moral rights.¹⁵² Once most art pieces are sold, new owners may use the works regardless of the artist's desires.¹⁵³ New owners can even use the work in a manner that "is offensive or destroys the intended meaning and spirit of the art."¹⁵⁴ As discussed above, because food artists seek to protect the future use of their creations, such rights are highly desirable. For covered pieces, the only limitations imposed on a buyer in the United States are "outlined in the first sale doctrine and in the Visual Artists Rights Act of 1990 (VARA)."¹⁵⁵ The VARA, however, is highly limited in its coverage. The section below examines the VARA and the viability of expanding this recent statute to include food art.

1. The Visual Artists Rights Act ("VARA")

VARA "grants a bundle of moral rights to a limited group of visual artists."¹⁵⁶ Though VARA expands the legal protections available to artists, it narrowly defines the term "work of visual art," and therefore may be applied only in select circumstances.¹⁵⁷ For all other non-covered works, common law causes of action are the only alternative for obtaining moral rights protection.¹⁵⁸

152. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 4-5 (1985).

153. Julie Levy, *Creative Works as Negotiable Instruments: A Compromise Between Moral Rights Protection The Need for Transferability in the United States*, 5 VAND. J. ENT. L. & PRAC. 1, 27 (2003).

154. *Id.*

155. *Id.*

156. Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?* 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1215 (2002); *see also* 17 U.S.C. § 106A.

157. *Id.*

158. Rigamonti, *supra* note 109, at 405.

Even if the VARA were made applicable to food art, the moral rights themselves would be heavily restricted. This restriction is because covered pieces are subjected to several fair use exceptions, such as when the work is used for “criticism, comment, news reporting, [and] teaching.”¹⁵⁹ Courts apply a four-factor balancing test to determine if the use of the copyrighted material is covered by the exception.¹⁶⁰

There are also additional VARA restrictions, for example, as even covered visual artists are denied protection for reproductions,¹⁶¹ and the protections that are available under VARA are not only capable of being waived outright, but also expire after the author dies.¹⁶² The ability to prevent reproductions is a critical protection for food artists, as this is the manner in which the majority of their creations are affected.

VARA preempts state statutory and common law. Any rights visual artists may have had under the common law or under state statutes for works covered by the VARA are no longer available.¹⁶³ Though it is beyond the scope of this paper to discuss possible state statutory and common law options, it is interesting to note this additional contraction of U.S. artistic protection.

It is not only “sensory snobbery” and short-term economic consideration that is spurring the erosion of moral rights protection for artists; it is also attributable to the recent number of overly broad court rulings that have misapplied VARA. As a result of such rulings, the restrictiveness of VARA has expanded to reach non-covered works in non-VARA cases. Courts have reasoned that because VARA limited moral rights protection to a small subset of authors and works, Congress must have intended to preclude other types of protection as well.¹⁶⁴ In *Lee v. A.R.T. Co.*, for example, the Seventh Circuit held that because the plaintiff’s works would not qualify as works of visual art under the VARA, it

159. 17 U.S.C. § 107.

160. *Id.*

161. Levy, *supra* note 153, at 28; 17 U.S.C. § 106A(c)(3).

162. 17 U.S.C. § 106A(d).

163. Rigamonti, *supra* note 109, at 405 n.307 (citing 17 U.S.C. § 301(f) (“preempting state common and statutory law in relation to rights equivalent to those granted by § 106A”)).

164. *Id.* at 407.

would therefore be unsound “to use § 106(2) to provide artists with exclusive rights deliberately omitted from the [VARA].”¹⁶⁵ As Author Cyrill Rigamonti articulates, this form of reasoning is being applied to erroneously “support the conclusion that nothing outside the VARA, not even a copyright infringement claim, can be used to protect moral rights.”¹⁶⁶ It is not only food art that is being denied sound legal protection, but increasingly other art forms as well.

Though the United States has applied international doctrines, such as the Berne Convention’s moral rights stipulations or the TRIPS’ focus on harmonizing copyright for the purposes of trade, there is still a gap in coverage afforded to food art. In addition, the coverage provided to other artists is being altered, and, in some areas, for the worse.

The next part reviews European Union (E.U.) application of moral rights doctrine and copyright law to assess their effectiveness as a means to protect food art.

C. Evaluating E.U. Protection of Food Art

The E.U. legal framework is made-up of Directives, which member states enact into their national laws.¹⁶⁷ The most relevant Directive regarding copyright is Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation [sic] of certain aspects of copyright and related rights in the information society (“Copyright Directive”).¹⁶⁸

Unlike the emphasis on economics which underlies U.S. copyright law, European copyright law is based on a natural rights

165. 125 F.3d 580, 583 (7th Cir. 1997); *see also* Rigamonti, *supra* note 109, at 408.

166. Rigamonti, *supra* note 109, at 408.

167. *What Are E.U. Directives?*, EUROPEAN COMMISSION (Aug. 17, 2011), http://ec.europa.eu/community_law/introduction/what_directive_en.htm.

168. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>.

theory.¹⁶⁹ This theory presumes that authors “always retain their personal or moral rights even if they sell their economic rights”¹⁷⁰ and that “personal rights are inalienable.”¹⁷¹ Rigamonti explains that “[t]he inclusion of moral rights in statutory copyright law was generally understood to be the defining feature of the Continental copyright tradition, while the lack of statutory moral rights protection was considered to be a crucial component of the Anglo-American copyright tradition.”¹⁷²

Because the U.S. Supreme Court rejected the natural rights theory early in its legislative history,¹⁷³ many perceive the European copyright laws to be more favorable to authors than those in the United States.¹⁷⁴ Some have even described U.S. behavior as “copyright isolationism,” which resulted in foreign jurisdictions expressing “reservations about the weight that should be accorded to U.S. decisions.”¹⁷⁵ In the United States, if there is no economic injury involved, the integrity of a piece of art is not considered.¹⁷⁶ This philosophy conflicts with the approach taken by civil law E.U. countries, such as France.¹⁷⁷

In France, the goal of copyright legislation is to protect the artists’ vision.¹⁷⁸ Though the moral rights approach by France and other E.U. member states appears on its face to be more favorable to food artists, this is not necessarily the case. The underlying copyright framework among member states in the European Union and the United States is similar. Moral rights, or the lack thereof, is the primary distinction. Therefore, if food artists were already protected by E.U. copyright law, added moral rights would be beneficial. Because they are not explicitly protected, however,

169. Tiefenbrun, *supra* note 111, at 9.

170. *Id.*

171. *Id.*

172. Rigamonti, *supra* note 109, at 354.

173. Tiefenbrun, *supra* note 111, at 9; *see also* Wheaton v. Peters, 33 U.S. 591, 654-68 (1854).

174. Tiefenbrun, *supra* note 111, at 9.

175. Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 138 (2005).

176. Pettenati, *supra* note 140, at 435.

177. *Id.*

178. *Id.*

these rights do not contribute to food artists' protections. Should enhanced legislation be developed, however, food artists would be well advised to seek protection under these jurisdictions, as compared to the United States.

Currently, the European Union also lacks an effective code supporting culinary intellectual property, although the European Union does support enhanced safeguards for fashion designs.¹⁷⁹ This unique provision, in conjunction with the rising frustrations expressed by the food industry, may herald the development of a similar provision for food art. Unlike the E.U., the U.S. maintains a noticeable gap in its regulation of fashion and fragrance, in addition to food. The purpose of the E.U.'s protection of fashion designs is to "foster creativity and innovation."¹⁸⁰ This protection for *visual* aesthetics in Europe, as in the United States, again reflects a philosophy that the gustatory sense is inferior to the visual. The added protections for fashion designs do reflect, however, a broader application of copyright law and may engender further expansion in this direction.

IV. EVALUATING POSSIBLE SOLUTIONS

A. Expanding Current Protections

As Parts II and III have shown, both domestic and international copyright protections for food artists are limited. While some scholars argue that increasing I.P. protection would "hinder competition among chefs and restaurants, discourage creativity and innovation, and undermine the culinary industry's norm of

179. See Leslie J. Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341, 374 (1991).

180. *Industrial property: Registration of "Community Designs" from 1 April 2003- Frequently Asked Questions*, EUROPA (Apr. 1, 2003), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/77&format=HTML&aged=0&language=EN&guiLanguage=en>. Press Release, Office for Harmonization in the Internal Market (EU), *Industrial property: Registration of "Community Designs"*, 1, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/77&format=HTML&aged=1&language=EN&guiLanguage=en>.

sharing,”¹⁸¹ this paper maintains otherwise. Studies reveal that the cost of running a restaurant is mounting.¹⁸² With such added expense, it will be increasingly difficult to encourage chefs to be innovative if they do not have financial protection.¹⁸³ Absent legislative change protecting culinary creators, an increase in litigation seeking such a result is possible.¹⁸⁴

In light of the legislative gaps discussed in the preceding sections, the following paragraphs briefly examine possible solutions to the food art impasse.

1. Copyright Protection

An ostensibly simple solution would be to reinterpret the Copyright Act to include recipes or built food within its ambit. This would mean that the preparation of a recipe at home, for example, would be permissible, but the preparation of the same dish in a public restaurant would require the copyright holder's permission.¹⁸⁵

Authors Kal Raustiala and Christopher Sprigman point out that restaurants are already required to pay license fees to “publicly perform” musical pieces, even when they simply insert a CD into their stereos.¹⁸⁶ They argue that, by analogy, paying the inventor of a recipe for the right to use the recipe for the benefit of prospective customers is similar and should therefore not be as striking.¹⁸⁷ Whereas music is incidental to the restaurant business, cuisine is its primary product.¹⁸⁸ Thus, fairness suggests that, in light of the importance and utility of the recipe, the originator should receive recompense, or, at a minimum, a form of attribution.

181. Cunningham, *supra* note 6, at 22.

182. *Id.* at 23.

183. *See id.*

184. *Id.* at 23-24.

185. Raustiala & Sprigman, *supra* note 3, at 1767-68.

186. *Id.* at 1768.

187. *Id.*

188. *Id.*

2. Food Art as “Applied Art” in Section 102(a)(5)

Though it is inconsistent with the customs interpretation, the Copyright Act does provide protection to works of applied art.¹⁸⁹ Applied art “encompasses all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent production.”¹⁹⁰ On its face, therefore, this appears to be the ideal provision for food art protection. Even if the item has a utilitarian component, for instance, edibility in the case of food art, it would be eligible. The item would also be eligible if, as may be the case for some recipes, there is a possibility of obtaining a patent.

The applied art provision provides copyright protection for pieces that are primarily utilitarian but that also incorporate separate “pictorial, graphic, or sculptural features” that are identifiable.¹⁹¹ Broussard explains this to mean that such works perform a dual function. They are utilitarian, in that they may be used for a function, and also aesthetic, in that they are a reflection of an artist’s expression.¹⁹² These pieces are labeled works of “artistic craftsmanship” and are distinct from works of applied art. Revisiting arguments made in Part I, food art can be expressive. The problem with this applied art exception, however, is, as Broussard points out, that the expressive component must be *visual*.¹⁹³ While certain types of food art, such as pastry sculptures, may be designed primarily for visual appeal, most food items are designed with a gustatory focus. This emphasis is not supported by the applied arts exception.

To resolve the issue that is the focus of this paper, however, it may be beneficial to expand the exception to include recognition

189. Broussard, *supra* note 2, at 721-22 (citing H.R. Rep. No. 94-1476 (1976)).

190. H.R. Rep. No. 94-1476.

191. 17 U.S.C. § 101 (2000).

192. Broussard, *supra* note 2, at 722.

193. *Id.* at 723.

of expressiveness as depicted by gustatory or olfactory experiences.

3. *Moral Rights Hybrid*

Moral rights generally follow economic rights, in a piggyback form of relationship. If the United States and the European Union are unwilling to adjust their copyright legislation to protect recipes and built food, an alternative may be to bestow moral rights *without* the underlying economic rights. Moral rights such as the right to attribution would likely be applauded in the culinary community. Though the bare right to attribution does not, on its own, possess financial significance, it is likely that it would indirectly benefit the artist financially. If the chef's work is well received and proper credit is given, then diners may seek out additional pieces by the original author and thereby generate revenue for the chef.

A moral rights hybrid of this kind would also require minimal reconfiguring of existing legislation. There would be no inconsistency with present law, overlap, or contradiction. Several moral rights are already recognized in the United States under VARA, and therefore the underlying principle, though less popular in the United States than in the European Union, is not entirely anathema to consumers, or to Congress.

B. Developing New Structures

1. *State Law*

Section 301 of the 1976 Copyright Act states that on and after January 1, 1978, federal copyright law preempts the entire field for works and rights within its scope.¹⁹⁴ This means that numerous state common law and statutory copyright rights have been abrogated.¹⁹⁵ Some residue, however, remains.¹⁹⁶ Section 301(b)(1) recognizes that state law may be applied, but is not

194. DuBoff, *supra* note 37, at 166.

195. *Id.*

196. *Id.*

required, to protect those categories of works that fall outside the scope of the federal statute.¹⁹⁷ More importantly, however, Section 301(b)(3) leaves intact state rights that are not equivalent to any of the rights specified in Section 106 of the 1976 Act.¹⁹⁸

This preemption has the potential to provide legal benefits to the creative developers of recipes and built foods. Works that “fall outside the scope” of federal law include food creations, an aesthetic form presently omitted from coverage. This opening therefore may be a subtle indication that state law is the most efficient way of addressing the legislative gap. State law solutions, of course, would only apply to food art created in or by artists from the state in question. Thus, any protection would be limited in scope. Often, however, if a state law proves effective, other states will follow suit. Moreover, the benefit of working to resolve an issue state-by-state means that if there are errors issues are readily resolved. As mentioned, the most valuable right for cuisine is attribution. A state may implement a limited-duration statute protecting a recipe-writer or food sculptor’s creation, and, if the preliminary statute is effective, they may continue to increase the duration and expand the rights.

V. CONCLUSION

The present intellectual property regime in the United States “allows free appropriation of both recipes and built food.”¹⁹⁹ This form of appropriation is widespread and, in some circles, encouraged.²⁰⁰ But the intrinsic nature of a culinary creation does not appear to be substantially different from other art forms, which receive superior copyright protection. Part II reviewed the aesthetic aspects of recipes and built food. Because food possesses the requisite elements of form, content, and context, it could be considered “art” under academic guidelines.

197. *Id.*

198. *Id.*

199. Raustiala & Sprigman, *supra* note 3, at 1768 (citing Katy McLaughlin, *That Melon Tenderloin Looks Awfully Familiar*, WALL ST. J., June 24, 2006, at P1, P9).

200. *Id.*

Part III examined the various international copyright schemes, including the Berne Convention and the TRIPS. Though the Convention could arguably support enhanced copyright protections for food art, without attendant U.S. legislation to implement the Berne mandates, this is unlikely.

In light of the Convention, and foreign states' remonstrations concerning moral rights, Congress enacted VARA. But, due to the limited scope of VARA, the added protections are unavailable to food artists. The United States is not alone, however, in neglecting to shield culinary creations from copying. The European Union also fails to safeguard these artists' rights.

This paper proposes several solutions to this domestic and international impasse. Expanding coverage under the Copyright Act is one option. Another involves an application of the applied art exception. But neither of these recommendations is likely to be effective. Congress has long considered amendments to the scope of the Copyright Act and many have lobbied for changes, but it remains in its current form. The most realistic solutions appear to be a moral rights hybrid option or reliance on state law. Generally, moral rights may be applied in addition to economic rights. Given the complexity of the current system and the political challenges involved with overhauling entire statutory frameworks, simply adding a single moral right, attribution, would be effective in curtailing unbridled copying.

The systemic undervaluation of food art in domestic legal doctrine is troubling. This discrimination may be the result of the perception that taste occupies a "low standing . . . in the hierarchy of the senses."²⁰¹ Nonetheless, this disparate treatment is at odds with U.S. economic philosophy, which maintains that bestowing copyright reflects "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."²⁰² But food artists are not gaining as much as they could and there is certainly room for improvement.

201. Levy, *supra* note 7, at 4.

202. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).